

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 JOEL M. CRAM, MINH D. NGUYEN, and
11 ROES 1 through 10, individually, and on
behalf of all others similarly situated,

12 Plaintiffs,

13 vs.

14 ELECTRONIC DATA SYSTEMS
15 CORPORATION, a Delaware
16 corporation, and DOES 1 through 100,
inclusive,

17 Defendants.

CASE NO. 07cv1842-LAB (NLS)

**ORDER DENYING PLAINTIFFS'
MOTION FOR ORDER
DIRECTING CURATIVE
COMMUNICATION**

[Dkt No. 38]

18 Defendant Electronic Data Systems Corporation ("EDS") removed to federal court this
19 putative class action alleging solely state labor law and unfair competition claims associated
20 with allegations of failure to pay its employees owed overtime compensation. The matter
21 is before the court on the named plaintiffs' motion for a court Order directing EDS to circulate
22 a "curative communication" to prospective class members to ensure: (1) they are aware of
23 the pendency of this lawsuit; (2) they are aware they may have claims under California labor
24 law which differ from and may survive any waiver of claims arising under the federal Fair
25 Labor Standards Act ("FLSA"), the subject matter of the EDS communications plaintiffs find
26 objectionable; and (3) they remain eligible to participate in this lawsuit, in the event the court
27 certifies it as a class action, even if they accept back overtime compensation owed under
28 federal law and have signed or will sign EDS' proffered receipt. EDS filed an Opposition,

1 and plaintiffs filed a Reply. Pursuant to Civil Local Rule 7.1(d)(1), the court finds the issues
2 presented appropriate for decision on the papers and without oral argument. For the
3 reasons discussed below, plaintiffs' Motion For Order Directing A Curative Communication
4 ("Motion") is **DENIED**.

5 EDS communicated with certain of its employees or former employees using a U.S.
6 Department of Labor ("DOL") form associated with the tender of back overtime
7 compensation as calculated under the federal Fair Labor Standards Act ("FLSA"). A cover
8 letter from EDS to those employees explained EDS conducted a voluntary job code review
9 under the supervision of the DOL to identify job functions appropriately re-classified as
10 overtime eligible, EDS records indicated the recipient may have performed one of those re-
11 classified functions within the past three years, and EDS "has decided to compensate you
12 for back overtime you may have worked during this period." Hittle Decl. Exh. A-5. The
13 communications were accompanied by a DOL receipt to be executed and returned by the
14 recipient and expressly alerted the recipients state labor law may differ from federal law,
15 including with respect to the period of recoverable back overtime pay. Id.

16 Despite the purely federal law auspices under which the communications and
17 tendered compensation were distributed, plaintiffs perceive a "danger that Prospective Class
18 Members may be left with the inaccurate understanding" that by accepting EDS' payments
19 proffered under federal labor law, they "are somehow barred from recovering back overtime
20 recoverable under" California law. Mot. P&A 5:2-7. Plaintiffs worry "Prospective Class
21 Members may also be left with an inaccurate belief that any overtime compensation earned
22 between three (3) and four (4) years ago cannot be recovered" because of a reference in the
23 communication to two-year and three-year recovery periods. Id. 5:8-9. They predicate their
24 Motion on their opinion "it would seem appropriate" to inform prospective class members of
25 the pendency of this lawsuit "prior to being asked to execute any document which may be
26 construed as a release of any kind or character." Id. 5:9-12. Without a "curative
27 communication" providing prospective class members with such information "in the near
28 future, they may conclude . . . they need not read any notices which this Court may order"

1 in this action "because they may believe they have 'settled' their claims." Id. 5:12-15. They
2 also express "concern" that EDS might try to use the Receipts to assert an affirmative
3 defense of release of claims for all back overtime payments. Id. 5:15-17.

4 Plaintiffs rely on the court's "duty to supervise pre-certification communications with
5 Prospective Class members" to protect "the integrity of the class and the administration of
6 justice," citing FED. R. CIV. P. ("Rule") 23(d) and Gulf Oil v. Bernard, 452 U.S. 89, 100-102
7 (1981) (holding that while a district court has "broad authority to exercise control over a class
8 action and to enter appropriate orders governing the conduct of counsel and parties," orders
9 limiting communications between parties and potential class members "should be based on
10 a clear record and specific findings that reflect a weighing of the need for the limitation and
11 the potential interference with the rights of the parties" upon a specific "showing by the
12 moving party of the particular abuses by which it is threatened," and any such Order should
13 be "consistent with the narrowest possible relief which would protect the respective parties").
14 The Gulf Oil court found a district court's "sweeping restraint order," restricting
15 communications from named plaintiffs and their counsel to prospective class members
16 during the pendency of a class action, failed to weigh competing factors and failed to
17 disclose the grounds on which the court could have determined the Order was necessary
18 or appropriate.

19 This Motion seeks not to restrain EDS' communications but rather to compel follow-up
20 communications in a manner helpful to the advancement of plaintiffs' position in this
21 litigation. However, plaintiffs fail to persuade the court their fears and speculation regarding
22 possible misunderstandings by potential class members need to be addressed at this pre-
23 notice, pre-certification phase in the litigation. Moreover, from the face of the FLSA-based
24 communications, no recipient accepting the proffered back overtime pay calculated under
25 federal law is asked to waive state law rights nor does the communication propose an
26 election of remedies. Plaintiffs fail to make the case for any compelling need to explain all
27 such distinctions and eligibilities in advance of an eventual notice to class members, nor do
28 they provide any principled basis upon which the court can weigh the competing rights and

1 obligations of the parties on any record permitting the specific findings a district court must
 2 make before issuing orders affecting the rights of the parties to communicate with potential
 3 class members. It is insufficient to assert simply, as do plaintiffs here, "it would seem
 4 appropriate" for the court to intervene at this time.

5 EDS characterizes the Motion as "frivolous" because "it is undisputed [EDS] has
 6 voluntarily paid back overtime to certain current and prior employees in exchange for a
 7 waiver of their right to pursue an action under the federal Fair Labor Standards Act, 29
 8 U.S.C. ss 201 *et seq* (the 'FLSA') . . . [and] plaintiffs in this matter have not sought to pursue
 9 a claim under the FLSA on behalf of themselves or the putative class members." Opp. 2:2-
 10 7. "Furthermore, these payments were largely mailed out **prior** to the filing of this case."¹
 11 Id. 2:7. Plaintiffs do not dispute the waiver form EDS tendered along with the payments is
 12 "a standard form prepared by the [DOL] . . . [which] specifically notifies the recipient that the
 13 waiver applies **only** to FLSA claims," and the cover letter "expressly advises that state laws
 14 may differ from the FLSA." Id. 2:8-13. EDS further objects the requested "curative
 15 communication" to each employee who received a waiver would have to be distributed
 16 "whether or not the employee would be part of the purported putative class in this case." Id.
 17 2:14-16. They argue the forms EDS sent "were noncoercive and completely accurate," and
 18 plaintiffs' "request is an improper attempt to leapfrog the certification phase of this matter
 19 and proceed directly to class notification." Id. 2:14-22.

20 Plaintiffs identify no actual "abuse" or "threat[]" to create confusion and influence the
 21 threshold decision whether to *remain in the class* in the procedural posture of this case.
 22 Mot. P&A 5:25-6:2 (emphasis added), *quoting In re School Asbestos Litig.*, 842 F.2d 671,
 23 683 (3rd Cir. 1988) (addressing post-class-certification communications regarding the very

24
 25 ¹ In reliance on the Evans Declaration provided in support of their Opposition, EDS
 26 represents checks were mailed to employees included in EDS' voluntary audit "in several phases
 27 beginning in April 2007." Op. P&A 4:16-17. "Of the 58 checks sent to putative class members who
 28 are still employed by EDS, only **one** was sent after August 21, 2007 (the date the Complaint in this
 matter was filed) . . . [and the] final phase of the self-audit was completed on September 27, 2007
 when checks were mailed to employees who had been separated from EDS prior to or during the
 audit." Id. 4:17-21. EDS removed the action to federal court on September 20, 2007 pursuant to the
 Class Action Fairness Act of 2005, 28 U.S.C. s 1332(d), and the federal case recently survived
 plaintiffs' Motion To Remand.

1 subject matter of the litigation which urged particular conduct by actual class members,
2 where the reviewing court held the district court lacked a proper Rule 23(d) basis to restrict
3 communications with the class as expansively as had been ordered) and In re Currency
4 Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237, 252 (S.D.N.Y. 2005) (substantiating
5 "one policy of Rule 23 is the protection of class members from 'misleading communications
6 from the parties or their counsel'" (citation omitted). A mere possibility of confusion is
7 insufficient to justify the district court's exercise of supervisory authority over parties'
8 communications with potential class members. Plaintiffs' purely speculative concerns
9 regarding what the individuals receiving the communications from EDS "may believe," in light
10 of the absence of any actual misinformation likely to affect the rights of potential class
11 members, convince the court judicial intervention to compel EDS to issue "corrective"
12 communications at this time is unnecessary and would be inappropriate. See, e.g., Parks
13 v. Eastwood Ins. Servs., 235 F.Supp.2d 1082, 1084 (C.D. Cal. 2002) (denying application
14 to prevent defense communications with potential "opt-in" class members in a FLSA class
15 action, noting "pre-certification communication from the defense to prospective plaintiffs is
16 generally permitted" and holding "a defendant employer may communicate with prospective
17 plaintiff employees who have not yet 'opted in,' unless the communication undermines or
18 contradicts the Court's own notice to prospective plaintiffs"). Plaintiffs' Motion complains
19 EDS made no mention of this action, quite the opposite of circumstances where defendants
20 misrepresent the nature of a class-action lawsuit or attempt to counsel potential class
21 members to opt out of particular litigation. See Great Rivers Cooperative of Southeastern
22 Iowa v. Farmland Industries, Inc., 59 F.3d 764 (8th Cir. 1995) (holding the district court's
23 Order granting plaintiffs' motion to regulate defendant's communications under Rule 23(d)
24 both restraining and enforcing speech did not arise from improper communications with
25 plaintiffs and lacked a clear record, lacked specific findings regarding what was misleading
26 and why, and failed to weigh the need for the limitation in consideration of potential
27 interference with the rights of the parties under the Gulf Oil standard, so that a curative
28 notice from the court was not justified). The challenged communication here does not omit

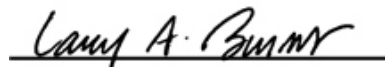
1 any critical information and actually alerts recipients their rights under state law may differ
2 from their rights under federal law.

3 The court finds the objectives of plaintiffs' proposed "curative communication" can be
4 effectively achieved in the normal course at the class notice phase of this litigation. Plaintiffs
5 do not make the case for urgency to explain to potential class members the distinctions
6 between federal labor law rights and issues outside the scope of this litigation and the
7 independent state law claims advanced in this lawsuit. Plaintiffs' conjecture offers no basis
8 for specific findings the court must make before it may properly compel or restrict EDS'
9 communications, particularly when they were not inherently abusive nor coercive and do not
10 appear to have compromised the state law rights of any potential class member. The court
11 finds on balance EDS' challenged communication with potential putative class members was
12 neither misleading nor improper so as to justify the court's intervention at this time.

13 For all the foregoing reasons, **IT IS HEREBY ORDERED** plaintiffs' Motion For Order
14 Directing Curative Communication is **DENIED**. Each side shall bear its own costs associated
15 with the Motion.

16 **IT IS SO ORDERED.**

17 DATED: January 16, 2008

18 

19 **HONORABLE LARRY ALAN BURNS**
20 United States District Judge
21
22
23
24
25
26
27
28